Supreme Court, U.S.
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No.
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In The

Supreme Court of the United States

October Term, 1995

KMART CORPORATION,

Petitioner,

vs.

LARRY LAUGHLIN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a case removed from state court on the basis of diversity jurisdiction, did the Tenth Circuit Court of Appeals (a) in holding that the federal court did not have subject matter jurisdiction because the amount in controversy was not set forth in Respondent's state court petition nor in Petitioner's Notice of Removal, and (b) in refusing to consider evidence in the record demonstrating the amount in controversy was well above the jurisdictional minimum of $50,000, fail to follow this Court's decision in *McNutt v. General Motors Acceptance Corporation,* which held that, when challenged, the Petitioner shall have the opportunity to prove jurisdictional amount by a preponderance of the evidence?

2. Did the Tenth Circuit Court of Appeals, by holding that to establish diversity jurisdiction in a case removed from state court the jurisdictional amount must be explicitly set forth in Respondent's state court petition or Petitioner's Notice of Removal, and by failing to consider evidence in the record that the amount in controversy was well above the jurisdictional minimum of $50,000, decide an issue directly contrary to the decisions of the Second, Fifth, Sixth, and Seventh Circuit Courts of Appeals, thereby creating an inter-circuit conflict?

3. Did the Tenth Circuit Court of Appeals, in refusing to permit Kmart to amend its Notice of Removal to allege the amount in controversy exceeded $50,000, evidence of which was in the record, fail to apply 28 U.S.C. § 1653, which allows a party to amend a facially defective jurisdictional pleading, and thereby so far depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision?

LIST OF PARTIES

Petitioner and Respondent are named in the caption and were also parties before the United States Court of Appeals for the Tenth Circuit.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioner states it has no parent corporation, and lists below its non-wholly owned subsidiaries:

Borders Group, Inc.

Kmart Metro Ltd.

Kmart Mexico S.A. de C.V.

MAJ a.s.

Meldisco Subsidiaries of Melville Corporation

OfficeMax, Inc.

The Sports Authority, Inc.

Thrifty Payless Holdings, Inc.

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OPINIONS BELOW

The Tenth Circuit's opinion below (Appendix B, 3a-7a) is officially reported at *Laughlin v. Kmart Corporation*, 50 F.3d 871 (10th Cir. 1995). In that opinion, the Tenth Circuit found a lack of subject matter jurisdiction over the parties because Petitioner, while citing the diversity of citizenship of the parties, failed to set forth the requisite jurisdictional amount in its Notice of Removal of Civil Action to the United States District Court for the Northern District of Oklahoma. The Tenth Circuit ordered the District Court to vacate the summary judgment it had entered on behalf of the Petitioner and from which the Respondent had appealed to the Tenth Circuit, and to remand the case to Oklahoma state court.

STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals filed its opinion on March 20, 1995. Appendix B, 3a-7a. Petitioner timely sought rehearing, which the Tenth Circuit denied on April 10, 1995. Appendix A, 1a-2a. Jurisdiction lies under 28 U.S.C. § 1254(1) for this Court to review the final decision of the Tenth Circuit Court of Appeals.

This petition for certiorari is being filed under Rules 13.1 and 13.4 of this Court.

STATUTES AND RULES INVOLVED

This case involves the following statutes and rules, which are fully reprinted in Appendix F, 24a-27a: 28 U.S.C. § 1332(a); 28 U.S.C. § 1441(a); 28 U.S.C. § 1446(a); 28 U.S.C. § 1653; 12 Oklahoma Statutes, § 2008(A); and Rule 11(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Factual Background

This is an action for breach of employment contract and wrongful termination, originally filed in the District Court in and for Tulsa County, Tulsa, Oklahoma. Larry Laughlin ("Laughlin") was employed by Kmart Corporation ("Kmart" or "Petitioner") in its automotive division. Laughlin voluntarily terminated his employment with Kmart on October 12, 1992. Laughlin filed his state court petition on January 12, 1993, alleging that Kmart constructively discharged him because of his refusal to participate in certain work-related activities which Laughlin claims were illegal. *See* Exhibit A to Appendix E, 18a-23a. In his state court petition, Laughlin requested, with regard to his breach of contract claim, "an amount in excess of $10,000," and costs of the action, including attorney fees. With regard to his wrongful termination claim, Laughlin requested "front pay, back pay, interest, loss of benefits, bonuses, raises, and punitive damages in excess of $10,000," and the costs of the action including attorneys fees.

By Oklahoma statute, plaintiffs seeking more than $10,000 in money damages are required to "set forth only that the amount sought as damages is in excess of Ten Thousand Dollars ($10,000.00) . . . ." Okla. Stat. tit. 12 § 2008(A)(2) (1991).

B. Proceedings Below

On February 2, 1993, Kmart filed its Notice of Removal of Civil Action ("Notice of Removal") to the United States District Court for the Northern District of Oklahoma. Appendix E, 14a-23a. The Notice of Removal set forth the diversity of citizenship between the parties, and stated that the case was removable pursuant to 28 U.S.C. §§ 1441 *et seq.* and 1446 *et seq.* The Notice

of Removal further stated that it was signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. The Notice of Removal did not expressly state that the amount in controversy was over $50,000; however, Laughlin never sought to remand to state court. On December 15, 1993, Kmart filed its Motion for Summary Judgment. On March 10, 1994, the district court granted partial summary judgment to Kmart on the issue of Laughlin's claim of constructive discharge. Thereafter, Laughlin settled his remaining claims with Kmart, rendering the Order Granting Partial Summary Judgment a final appealable order. On April 28, 1994, Laughlin appealed the district court's Order Granting Partial Summary Judgment to the Tenth Circuit Court of Appeals.

Cn December 14, 1994, the Tenth Circuit *sua sponte* issued an order requiring that the parties file simultaneous briefs on the following jurisdictional issues: (1) whether there was an adequate showing of jurisdictional amount in controversy at the time of removal to support original federal diversity jurisdiction in the case; and (2) whether Laughlin's notice of appeal was timely. Appendix C, 8a-10a. Neither of these issues had previously been raised by the parties nor by the trial court. The diversity of citizenship of the parties is not in question.

On December 29, 1994, Kmart filed its Brief Regarding Jurisdictional Issues Raised by the Tenth Circuit Court in its December 14, 1994 Order. Kmart's brief contained the affidavit of a former Director of Field Operations for Kmart setting forth calculations which demonstrated that, as of the time of filing of his original state court petition, the minimum actual damages available to Laughlin for back pay, should he prevail in the case, were $69,000. Appendix D, 11a-13a. Further, the affidavit contained an analysis indicating that Laughlin's potential front pay damages would be approximately $483,000. *Id. Laughlin presented no evidence pertaining to his potential damages nor rebutting the evidence presented by Kmart.*

On March 20, 1995, the Tenth Circuit issued its opinion, finding a lack of subject matter jurisdiction, remanding the case to the district court, and ordering the district court to vacate the summary judgment and remand the case to Oklahoma state court. Appendix B. The court held that it lacked subject matter jurisdiction because the requisite jurisdictional amount was not affirmatively pled in either Laughlin's Petition or Kmart's Notice of Removal. The Tenth Circuit stated: "[b]oth the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice." The consequence of facially defective pleadings as to jurisdiction is immediate dismissal of the action and remand to state court. The court further found that the evidence presented by Kmart in its brief on the issue of federal jurisdiction did not establish the existence of jurisdiction at the time the Notice of Removal was filed, but did not state upon what basis it made that determination.

Kmart filed a Petition for Rehearing on April 3, 1995. The Tenth Circuit denied rehearing by Order entered April 10, 1995. Appendix A.

REASONS FOR GRANTING THE WRIT

The substance of the Tenth Circuit's decision in this case is that a facially defective pleading of federal jurisdiction requires that the case be dismissed from federal court. Because the Tenth Circuit ordered that its opinion in this case be published, this decision constitutes binding precedent in the Tenth Circuit.

This Court should grant certiorari of this matter and review the Tenth Circuit's improper method of resolving the question of the adequacy of pleading jurisdictional amount and denial of federal forum for three separate reasons. First, the Tenth Circuit's decision in this case conflicts with applicable decisions of the

United States Supreme Court. Second, the Tenth Circuit's holding that if a removing party's Notice of Removal is facially defective by failing to affirmatively allege that the amount in controversy exceeds $50,000, the case must be remanded to state court, places the Tenth Circuit in direct conflict on the same matter with the Second, Fifth, Sixth, and Seventh Circuits. Third, the Tenth Circuit's decision, by ignoring federal law set forth in 28 U.S.C. § 1653, which allows amendment of defective allegations of jurisdictional pleading, departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I.

THE TENTH CIRCUIT VIOLATED THE UNITED STATES SUPREME COURT'S MANDATES IN THE *McNUTT* AND *ST. PAUL MERCURY* CASES BY REFUSING TO CONSIDER EVIDENCE IN THE RECORD PROVING THAT THE JURISDICTIONAL AMOUNT WAS MET.

A. Pursuant to this Court's Decision in *McNutt v. General Motors Acceptance Corp.* and *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, the Tenth Circuit Should Have Determined the Amount in Controversy Based Upon Evidence in the Record.

This Court mandated the correct method to determine whether an adequate jurisdictional amount has been pled, should the court or a plaintiff contest the defendant's allegation of federal diversity jurisdiction, in *McNutt v. General Motors Acceptance Corp*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 8 L. Ed. 1135 (1936). This Court held:

> If [the defendant's] allegations of jurisdictional facts are challenged by his adversary in an appropriate manner, he must

> support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging *jurisdiction justify his allegations by a preponderance of the evidence.*

(Emphasis added.) In *McNutt,* the Respondent brought suit to restrain the Indiana legislature from enforcing a legislative act regulating the business of certain purchasing contracts. *Id.*, 298 U.S. at 179. The Supreme Court addressed the question of whether the matter in controversy exceeded the jurisdictional amount (then $3,000). *Id.* The facts the Respondent alleged in its bill regarding the amounts alleged to be in controversy were in fact inapplicable to the determination of jurisdictional amount; the bill was "thus destitute of any appropriate allegation as to jurisdictional amount . . . ." *Id.*, 298 U.S. at 181. The Court noted that the United States legislature did not prescribe any particular mode in which the question of jurisdiction should be determined by the court. *Id.*, 298 U.S. at 185. Stating that "there should be a consistent practice in dealing with jurisdictional questions," the Court held that where the jurisdictional amount was questioned, the party alleging jurisdiction must prove jurisdiction by a preponderance of the evidence. *Id.* 298 U.S. at 188-89.[1]

In *McNutt,* this Court quite clearly authorized the submission of proof of the plaintiff's amount of damages in a

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1. *McNutt* is the seminal case on the burden borne by the defendant in proving jurisdictional amount in a removal action. *See, e.g., Tatum v. Laird,* 444 F.2d 947, 951 (D.C. Cir. 1971); *Business Buyers of New England, Inc. v. Gurham,* 754 F.2d 1 (1st Cir. 1985); *Kheel v. Port of New York Authority,* 457 F.2d 46, 48-9 (2d Cir. 1972); *Garza v. Bettcher Inds., Inc.,* 752 F. Supp. 753, 758-60, 763 (E.D. Mich. 1990).

court of competent jurisdiction to settle any question of meeting federal jurisdictional amount. In this case, after inquiry in the first instance by the appellate court, Kmart properly submitted proof of the potential monetary value of Laughlin's claims. Laughlin offered no proof tending to show that the value of his claims is less than $50,000. Indeed, he offered no proof to rebut that submitted by Kmart, which proof clearly evidenced that the jurisdictional amount had been met. Absent contradictory proof of the amount in controversy, then, Kmart's allegation of sufficient jurisdictional amount stands unrebutted and unrebutted evidence clearly meets the "preponderance of the evidence" standard. *See Gafford v. General Electric Co.*, 997 F.2d 150, 160-61 (6th Cir. 1993) (applying *McNutt*, the court found that defendant proved amount in controversy by a preponderance of the evidence when it offered testimony as to the amount of back pay, attorney fees, and other damages due plaintiff should she prevail, and plaintiff offered no rebuttal witnesses or affidavits in contradiction).

By its decision in this case, the Tenth Circuit violated the Supreme Court's *McNutt* rule allowing the party alleging jurisdiction (in this case, Kmart, because of its removal action) the opportunity to prove the requisite jurisdictional amount.

Further, the Tenth Circuit's decision violates the "legal certainty" test to determine the amount in controversy developed by this Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288, 58 S. Ct. 586, 82 L. Ed. 845 (1938). In *St. Paul Mercury*, this Court held that in order for a federal court to decline diversity jurisdiction, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.*, 303 U.S. at 289.[2] The Tenth Circuit did not apply the legal

2. In a typical application of *St. Paul Mercury* in a removal situation similar to this case, the Fifth Circuit recently held that if jurisdiction is (Cont'd)

certainty test to determine whether Laughlin's damages would not exceed $50,000. Indeed, if the Tenth Circuit had properly considered the unrebutted affidavit submitted by Kmart, rather than arbitrarily stating that the affidavit may not have addressed the correct time period, the court would have found that the jurisdictional amount is clearly met and there is no competent evidence (or *any* evidence) to the contrary.

This Court should grant certiorari and correct the Tenth Circuit's failure to follow Supreme Court precedent established in *McNutt* that a facially deficient jurisdictional pleading may be remedied by a submission of a preponderance of evidence establishing the amount in controversy. This Court should further correct the Tenth Circuit's failure to apply this Court's *St. Paul Mercury* legal certainty test to determine whether Laughlin's claim exceeds the jurisdictional amount.

II.

THE TENTH CIRCUIT'S DECISION TO DISMISS THIS CASE FROM FEDERAL COURT IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS ADDRESSING THE ISSUE OF JURISDICTIONAL AMOUNT IN REMOVAL ACTIONS.

In its brief regarding federal jurisdiction submitted to the Tenth Circuit, Kmart presented the court with unrebutted evidence that the amount in controversy exceeded $50,000. The court improperly rejected this evidence apparently because it did

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(Cont'd)

challenged after removal, and the defendant offers proof that the amount in controversy exceeds the jurisdictional amount, removal is proper unless the plaintiff can show to a legal certainty that the claim will not exceed the jurisdictional amount. *DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995), citing *St. Paul Mercury*, 303 U.S. at 289.

not explicitly appear in the state court Petition or the Notice of Removal. By refusing to consider the evidence in the record as to the amount in controversy, Tenth Circuit law is now in conflict with that of the Second, Fifth, Sixth, and Seventh Circuits. Further, the Tenth Circuit was given the option of remanding the case to the federal district court for further fact-finding on the jurisdictional amount issue. Refusing to remand in that situation placed the Tenth Circuit in conflict with the Second, Fifth, and District of Columbia Circuits. This Court should grant certiorari to remedy this split in the circuits over federal law.

A. The Tenth Circuit Failed to Consider the Record in Order to Determine the Amount in Controversy.

Consistent with this Court's holding in *McNutt*, the great weight of federal authority on both the appellate and district levels provides that when diversity jurisdiction is challenged in a removal action, the removing party must support the facts with:

> 'competent proof' and 'justify [its] allegations by a preponderance of the evidence.' *See United Food Local 919*, 30 F.3d at 305 (quoting *McNutt*, 298 U.S. at 189, 56 S.Ct. at 785); *see also Gaus v. Miles, Inc.*, 980 F.2d 564, 565-67 (9th Cir. 1992). If the pleadings alone are inconclusive *the court may look to other evidence in the record to determine whether the amount in controversy is met*. . . . This court has an obligation to make a factual inquiry into the amount in controversy.

(Emphasis added.) *Aucina v. Amoco Oil Co.*, 871 F. Supp. 332, 334 (S.D. Iowa 1994) (plaintiff sought compensatory damages, attorney fees, and interest in a discrimination and wrongful discharge suit). Further,

> [a]lthough the burden of proof of establishing jurisdiction in removed cases rests with the defendant, the Supreme Court in *McNutt* made clear that the Court must make an independent inquiry into the factual basis for its own jurisdiction, and this duty is codified in 28 U.S.C. § 1447(c) . . . .

Garza v. Bettcher Inds., Inc., 752 F. Supp. 753, 763 (E.D. Mich. 1990) (removal petition merely stated "the amount in controversy exceeds $50,000," but the court was satisfied that the amount exceeded $50,000 based upon the facts submitted by the defendant in its Motion for Reconsideration of the court's order to remand).

Thus, as established by this Court and properly followed by the Second (*United Food Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc.*, 30 F.3d 298 (2d Cir. 1994)); Fifth (*DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995)); Sixth (*Gafford v. General Electric Co.*, 997 F.2d 150, 158 (6th Cir. 1993)); and Seventh Circuits (*Gould v. Artisoft, Inc.*, 1 F.3d 544 (7th Cir. 1993)), where the amount of damages a plaintiff seeks is unclear, the appellate court is to look to the entire record and make an independent evaluation as to whether the jurisdictional amount is met.

Gafford v. General Electric Co. is directly on point with this case. In removing its case, General Electric ("GE") merely asserted "federal subject matter jurisdiction on the basis of diversity of citizenship and satisfaction of the amount-in-controversy requirement." *Gafford*, 997 F.2d at 155. Plaintiff claimed GE's petition for removal was defective in that it did not specifically allege $50,000 in controversy. *Id.* at 155-56, n.2. The court found that plaintiff had properly placed the issue of jurisdictional amount in controversy. *Id.* The Sixth Circuit held

that "[t]he 'preponderance of the evidence' ('more likely than not') test . . . best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction." *Id.* at 158. The court relied on testimony by a GE employee that the amount of back pay the plaintiff would be entitled to if she prevailed exceeded $50,000. *Id.* at 160-61.

The Fifth Circuit not only considers post removal affidavits attesting to the amount in controversy, *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A.*, 988 F.2d 559, 565 (5th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685, 126 L. Ed. 2d 653 (1994), but also considers plaintiffs' pleadings in other jurisdictions. *DeAguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1994) (court noted the plaintiffs pled damages of up to $5,000,000 in another jurisdiction for the same injuries they told the Fifth Circuit were limited to less than $50,000.)

In *Gould v. Artisoft, Inc.* the original complaint did not reveal the precise value of plaintiff's claim for shares of stock that had no ascertainable public value. *Gould*, 1 F.3d at 547. The court held that in order to determine the sufficiency of the jurisdictional amount, *the court is not obliged to rely solely on the plaintiff's complaint or on the jurisdictional statements in the removal petition;* it is entitled to consider affidavits on the matter. *Id.* at 547, n.1. The Seventh Circuit found the defendant had established the jurisdictional amount to a reasonable probability by submitting a draft of a prospectus it planned to issue with the initial public offering of the stock. *Id.* at 547. The plaintiff did not present evidence to contradict the estimated price range. *See also, Trenton v. Infinity Broadcasting Corp.*, 865 F. Supp. 1416, 1421 (C.D. Calif. 1994) (the defendant must "prove whatever is necessary to support removal"); *White v. J.C. Penney Life Ins. Co.*, 861 F. Supp. 25, 27 (S.D. W.Va. 1994), citing 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3725 (1985) (the court may consider an affidavit by the defendant attesting to jurisdiction, and "[t]he

court . . . is not required to leave its common sense behind" in construing the removal statute against removal).

In *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993), the Seventh Circuit faced an issue similar to the one presented in this case. Plaintiff had filed a products liability suit in state court in Illinois. Illinois law—like Oklahoma law—did not allow him to specify exact damages in his complaint beyond a set limit. *Id.* at 366. Thus, plaintiff's complaint asked only for damages "in excess of $15,000." *Id.* Plaintiff did not contest defendants' removal of the case to federal court, and, in fact, in his appellate brief to the Seventh Circuit, stated "This action is between citizens of different states and the amount in controversy exceeds Fifty Thousand Dollars ($50,000)." *Id.* However, when the appellate court raised the issue of jurisdictional amount, Plaintiff, in the court's words, "took up the jurisdictional issue with a vengeance." *Id.* The appellate court stated:

> Thus at oral argument we had the privilege of witnessing a comic scene: plaintiff's personal injury lawyer protests up and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a sob story about how plaintiff's life has been wrecked.

Id. The court observed that the state laws limiting the pleading of specific damage amounts create difficulty in ascertaining whether the requisite jurisdictional amount exists, and stated:

> A most absurd (and unsatisfactory) result would be to deny jurisdiction in each tort case from Illinois because the complaint filed in state court is unclear about the amount in controversy.

Id. at 367. The court acknowledged that one solution to the uncertainty would be for removal-minded defendants to request a specific amount in controversy from the plaintiff by interrogatory. It commented:

> We could punish Dow Brands for not figuring out that it should have fired off an interrogatory to Shaw before seeking removal, and remand the case to state court. But the interrogatory procedure in Illinois is optional, and if appellate judges are not mind readers, neither are litigants. We cannot expect Dow in this case to have divined from reading tea leaves that before seeking removal it had to pry a firm number out of Shaw by interrogatory.

Id. (citations omitted).

Here, as in *Shaw*, the Respondent was prohibited by state law from specifying his exact damage claim. Okla. Stat. tit. 12 § 2008(A)(2) (1991). Laughlin did not, however, dispute diversity jurisdiction once the case was removed, and to this date has presented no evidence that his claim does not exceed $50,000. Kmart submitted an affidavit which established to a reasonable probability that the jurisdictional amount exists. Thus, the Tenth Circuit should have found jurisdiction exists.

B. Assuming *Arguendo* that the Tenth Circuit Was Unable to Determine the Amount in Controversy Based Upon the Record Before It, the Court Improperly Refused to Remand the Case to the District Court for Further Fact-Finding as to the Amount in Controversy.

Where the record before the appellate court is insufficient to determine the amount in controversy, it is proper to remand the

case to the district court to allow the parties to submit further evidence on the amount in controversy. In *United Food Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc.*, 30 F.3d 298, 304-05 (2d Cir. 1994), the parties' pleadings did not establish that the amount in controversy exceeded $50,000. The Second Circuit stated:

> Where the pleadings themselves are inconclusive as to the amount in controversy, however, federal courts may look outside those pleadings to other evidence in the record. *See Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n.4, 91 L.Ed. 1209 (1947). . . .

United Food Local 919, AFL-CI0, 30 F.3d at 305 (citation omitted). Because the record was inconclusive as to the probability that the amount in controversy exceeded the statutory minimum, the Second Circuit found it "only fair" to remand the case to the federal district court for supplementation of the record to allow for an informed decision on the matter. *Id.* at 306. *See also, Georgiades v. Martin-Trigona*, 729 F.2d 831, 833-34 (D.C. Cir. 1984) (remand required for additional factual determinations as to whether claims were aggregated to meet minimum amount in controversy requirement); *United States ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc.*, 528 F.2d 986, 987 (5th Cir. 1976) (per curiam), *cert. denied*, 434 U.S. 828, 54 L. Ed. 2d 86 (1977) (remanding jurisdictional issue for reconsideration in light of development of factual record on remand).

Thus, the Tenth Circuit's refusal to remand to the district court for further factual development is in conflict with the Second (*United Food Local 919. AFL-CIO v. Centermark Properties Meriden Square Inc.*), Fifth (*United States ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc.*), and District

of Columbia Circuits (*Georgiades v. Martin-Trigona), supra.*[3]

The Tenth Circuit is in conflict not only with other circuits but with its own well-reasoned precedent. In *Penteco Corp. v. Union Gas System,* 929 F.2d 1519 (10th Cir. 1991), the plaintiff failed to plead facts sufficient to establish the necessary

---

3. As a matter of policy, some courts have concluded that in determining diversity jurisdiction, the face of the plaintiff's pleadings will not control if made in bad faith. *See DeAguilar,* 47 F.3d at 1410. State rules for civil procedure which prohibit plaintiffs from pleading for specific amounts in cases of unliquidated damages, such as Oklahoma's,

> have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith.

Id. at 1410 (citations omitted). The Fifth Circuit held that if the defendant can show, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional amount, the plaintiff can only effect remand of the case if he is able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages sought in the state court complaint. *Id.* at 1411.

Although Kmart is not claiming that Laughlin has intentionally manipulated the amount he claims in damages, the result is the same whether Laughlin manipulates his claim to damages or merely takes advantage of the Tenth Circuit's challenge of the amount in controversy: Kmart is now unable to remove the action as a result of the operation of 28 U.S.C. § 1446(b), since more than one year has passed since the commencement of the action. The extreme and final nature of precluding Kmart from a federal forum without adequately investigating the jurisdictional allegations merits remand to the federal district court for the limited purpose of establishing whether the plaintiff's claims for damages exceed $50,000.

citizenship of a limited partnership for diversity purposes. Although the plaintiff adequately asserted the requisite amount in controversy, as to the citizenship of the parties it merely averred that "[t]here is complete diversity of citizenship between the parties." *Id.* at 1521-22. The court held that "[w]here the pleadings are found wanting, an appellate court may also review the record for evidence that diversity does exist." *Id.* at 1521 (citation omitted). The Tenth Circuit determined that as an appellate court it was unable to make the necessary evidentiary rulings to determine the citizenship question. However, it remanded the case to the federal district court,[4] holding:

> [T]he interests of justice, fairness, and judicial economy require some additional opportunity to 'cure' such pleading defects, if possible.
>
> * * *
>
> The district court is the proper forum to determine if a curative amendment can be made.

Id. at 1523 (citations omitted).

Similarly, in *Gaines v. Ski Apache,* 8 F.2d 726, 729 (10th Cir. 1993), the Tenth Circuit, citing *Penteco*, stated:

> We examine the face of the complaint to determine whether
>
> > a party has adequately presented facts sufficient to establish diversity jurisdiction.

---

4. Coincidentally, the case returned to the same district court and judge (Judge Brett of the Northern District of Oklahoma) as in this case.

> The party asserting jurisdiction must allege facts essential to show jurisdiction. However, where the pleadings are inadequate, we may review the record to find evidence that diversity exists.

(Citations omitted). It is not clear why the Tenth Circuit departed so far from its analysis in *Penteco,* a case with a procedural issue remarkably similar to that in this case, to arrive at what is essentially the opposite result in this case.

III.

THE TENTH CIRCUIT VIOLATED 28 U.S.C. § 1653 BY FAILING TO ALLOW PETITIONER TO AMEND ITS DEFECTIVE ALLEGATIONS OF JURISDICTION.

Courts have the authority under federal law to permit an amendment to the pleadings to cure defects in jurisdictional allegations.[5] 28 U.S.C. § 1653 reads:

---

5. Kmart filed its Notice of Removal pursuant to the provisions of 28 U.S.C. § 1446. Section 1446(a) requires that the Notice contain "a short and plain statement of the grounds for removal" signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. By signing a pleading pursuant to Rule 11, the signatory certifies that to the best of his or her belief, formed after reasonable inquiry, the "claim, defenses, and other legal questions therein are warranted by existing law ... [and] the allegations and other factual contentions have evidentiary support. . . ."

The grounds for removal are set forth in 28 U.S.C. § 1441. In its Notice, Kmart certified that the case was removable and timely removed pursuant to the provisions of Section 1441, which allows defendants to remove a civil action from state court if a federal court would have had original jurisdiction. 28 U.S.C. § 1441(a). Kmart directly addressed the diversity of citizenship of the parties, and nowhere referred to a federal question; it is clear

(Cont'd)

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts

Applying this statute, the Third Circuit held that "amendments should be liberally permitted in the interest of justice to avoid dismissal of suits on purely technical grounds." *Local No. 1 (ACA) v. Int'l Brotherhood of Teamsters,* 614 F.2d 846, 849 (3d Cir. 1980). Application of the statute advances the goal of judicial economy. In *Richard Hoffman Corp. v. Loews Merrillville Cinemas, Inc.,* 758 F. Supp. 1258, 1259 (N.D. Ill. 1991), dealing with an inadvertent pleading defect in which the plaintiff failed to allege the citizenship of some of the defendants, the court stated:

(Cont'd)

Kmart asserted federal jurisdiction on the basis of diversity of citizenship. The requirements for exercising diversity jurisdiction are found at 28 U.S.C. § 1332:

> the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States . . . .

Kmart's Rule 11 certification that reasonable inquiry indicated its allegations of federal jurisdiction are warranted by existing law and have evidentiary support incorporates by reference the necessary predicates to diversity jurisdiction. Having properly pled the diverse citizenship of the parties, it is axiomatic that pursuant to its Rule 11 certification, Kmart contemplated that it met *all* the criteria for establishing diversity jurisdiction. Indeed, by use of the commonly accepted moniker of "diversity jurisdiction," any reasonable attorney would necessarily understand that the party was invoking federal diversity jurisdiction which, by definition, includes the minimum amount in controversy requirement.

> Because it seems likely that the curing of that oversight by [defendant's] counsel would demonstrate that total diversity really does exist, Section 1653 permits this Court to afford [plaintiff] an opportunity to provide the curative allegations rather than its having to pay a second filing fee.

In *Penteco,* 929 F.2d at 1522-23, the Tenth Circuit itself held that "the appearance of the possible defect [in subject matter jurisdiction] does not dictate dismissal of the federal suit. . ." and remanded the case to determine if a curative amendment under 28 U.S.C. § 1653 would be appropriate. In doing so, the Tenth Circuit stated:

> Although mindful of the presumption against jurisdiction, where, as here, the action has resulted in a final judgment in the district court, despite an unnoticed potential jurisdictional defect, we believe the interests of justice, fairness and judicial economy require some additional opportunity to "cure" such pleading defects, if possible.

Penteco at 1523. The appellate court remanded the case to the district court to determine whether, in fact, diversity of citizenship existed, and concluded: "If proper, amendment of Penteco's complaint to reflect or preserve diversity should be permitted." *Id.* The ruling in *Penteco* comports with an earlier Tenth Circuit decision, *Hendrix v. New Amsterdam Casualty,* 390 F.2d 299 (10th Cir. 1968). In *Hendrix,* the court commented:

> Without questioning that removal requirements should be strictly applied, the statute authorizing correction of defects by

> amendment to conform to the true facts should not be dissipated in the process, but should be given practical effect in accordance with its apparent intent.

Id. at 301-02. The court in *Hendrix* explicitly rejected the argument that amendment after the time for initially filing removal petitions has expired should not be permitted. In so doing, the court stated:

> [I]f applied to circumstances comparable to those of the present case, we believe that their reasoning would be too grudging with reference to the controlling statute [28 U.S.C. § 1653], too prone to equate imperfect allegations of jurisdiction with the total absence of jurisdictional foundations, and would tend unduly to exalt form over substance and legal flaw-picking over the orderly disposition of cases properly committed to federal courts.

Id. at 301. Thus, under *Hendrix* and *Penteco,* the appropriate course of action for the Tenth Circuit in this case, had it decided it had insufficient evidence to make a determination on the record before it, would have been to remand the case to the district court for a determination of whether the jurisdictional amount was met and, if so, direct the court to permit amendment under 28 U.S.C. § 1653. Its failure to do so was an extreme departure from its own accepted course of judicial conduct.

Courts in other jurisdictions have — like the Tenth Circuit — applied 28 U.S.C. § 1653 to prevent dismissal of cases based on purely technical defects in pleadings.

In *Miller v. Davis*, 507 F.2d 308 (6th Cir. 1974), the court found that plaintiffs had improperly pled 29 U.S.C. § 185(c) (a provision concerning where labor organizations may be sued) as the basis for subject matter jurisdiction, but ruled that plaintiffs should be given an opportunity to plead diversity of citizenship (28 U.S.C. § 1332) as the basis for subject matter jurisdiction. Citing 28 U.S.C. § 1653, the appellate court stated:

> Amendment to establish jurisdiction is broadly permitted, so as to effectuate Congress' intent in enacting § 1653 — to avoid dismissals on technical grounds.

Miller, at 311. The Eighth Circuit, in *Barclay Square Properties v. Midwest Federal Savings & Loan*, 893 F.2d 968, 969 (8th Cir. 1990), went even further, holding:

> This court may treat the complaint as amended to properly allege diversity of citizenship and address the merits of the appeal if the record establishes that diversity existed in the district court.

In *Stafford v. Mobil Oil Corp.*, 945 F.2d 803 (5th Cir. 1991), the appellate court, in its application of 28 U.S.C. § 1653, drew a distinction between defects in *allegations* of jurisdiction and defects in proof of jurisdiction. The Fifth Circuit stated:

> Thus, [s]ection 1653 provides a method for curing defective allegations of jurisdiction where the defect is merely one of the pleading and not one of an absence of proof of facts necessary to establish diversity of citizenship.

Id., at 806 (citations omitted).

In *Barrow Development Co. v. Fulton Insurance Co.*, 418 F.2d 316, 318 (9th Cir. 1969), the Ninth Circuit, citing the *Hendrix* decision, ruled that where allegations in a removal petition are merely defective, amendment should be allowed.

The overwhelming weight of authority from the circuit courts — including the Tenth Circuit — supports a conclusion that the appellate court should have reviewed the record to determine if the jurisdictional amount was, in fact, met, and pursuant to 28 U.S.C. § 1653, given Kmart an opportunity to amend its defective pleadings. Alternatively, the Tenth Circuit should have remanded the case to district court for such a review and directed that Kmart be allowed to amend its notice of removal if the jurisdictional amount could be established. The court, in failing to do so, has so far departed from the usual course of judicial proceedings that the Supreme Court should exercise its power of supervision.

CONCLUSION

Petitioner respectfully requests the Court grant this petition, issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, vacate the Tenth Circuit's Order remanding this case to state court, and order the Tenth Circuit to make a determination of the amount in controversy based on the record or remand the case to the Northern District of Oklahoma for fact-finding on the amount in controversy.

Respectfully submitted,

JAMES P. McCANN
Counsel of Record
KATHY R. NEAL
DOERNER, SAUNDERS,
DANIEL & ANDERSON
Attorneys for Petitioner
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ENTERED APRIL 10, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-5107

LARRY LAUGHLIN,

Plaintiff - Appellant,

v.

KMART CORPORATION,

Defendant - Appellee.

ORDER
Entered April 10, 1995

Before EBEL and KELLY, Circuit Judges, and BROWN*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

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*The Honorable Wesley E. Brown, United States District Court for the District of Kansas, sitting by designation.

Appendix A

Entered for the Court
PATRICK FISHER, Clerk

By: s/ Opal A. Carter
Opal Carter, Deputy Clerk

APPENDIX B — PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT FILED MARCH 20, 1995

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-5107

LARRY LAUGHLIN,

Plaintiff-Appellant,

vs.

KMART CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 93-C-97-B)

Michael H. Freeman (James E. Frasier and Gary Brasel with him on the brief) of Frasier & Frasier, Tulsa, Oklahoma, for Plaintiff-Appellant.

Kathy R. Neal (Lynn Paul Mattson and Kristen L. Brightmire with her on the brief) of Doerner, Stuart, Saunders, Daniel, Anderson & Biolchini, Tulsa, Oklahoma, for Defendant-Appellee.

Appendix B

Before EBEL and KELLY, Circuit Judges, and BROWN, District Judge.†

KELLY, Circuit Judge.

Plaintiff-appellant Larry Laughlin appeals the district court's order granting Defendant-appellee Kmart's motion for summary judgment. Due to a lack of jurisdiction, we remand to the district court with instructions to vacate the judgment and remand the action to state court.

Background

In January of 1993, Mr. Laughlin, a former employee of Kmart, filed a petition in Oklahoma state district court alleging a breach of his employment contract and wrongful constructive termination. Mr. Laughlin's petition alleged damages for each claim "in excess of $10,000." Kmart subsequently filed a notice of removal to federal court. The notice itself did not refer to an amount in controversy, although Plaintiff's petition was attached as an exhibit.

Mr. Laughlin neither objected to removal nor questioned the amount in controversy. The federal district court subsequently granted summary judgment in favor of Kmart on the constructive termination claim. Mr. Laughlin appeals. We raise the issue of the existence of diversity jurisdiction and find the same lacking.

Discussion

In order for a federal court to have original jurisdiction in a

† Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

diversity case, the amount in controversy must exceed $50,000. 28 U.S.C. § 1332(a). " 'A court lacking jurisdiction . . . must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking.' " *Tuck v. United Services Auto. Ass'n*, 859 F.2d 842, 844 (10th Cir. 1988) (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)), *cert. denied*, 489 U.S. 1080 (1989).

Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings. *See Ins. Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). Moreover, if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter. *Tuck*, 859 F.2d at 844. " '[T]he rule . . . is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' " *Compagnie des Bauxites*, 456 U.S. at 702 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970). The burden is on the party requesting removal to set forth, in the notice of removal itself, the "*underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000." *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992). Moreover, there is a presumption against removal jurisdiction. *Id.*

Neither Laughlin's petition nor Kmart's notice of removal establishes the requisite jurisdictional amount in this case. The

petition merely alleges that the amount in controversy is in excess of $10,000 for each of two claims. Aplt. App. at 1. The notice of removal does not refer to an amount in controversy, although the petition is attached as an exhibit to the notice. Aplee. App. at 1. Kmart sets forth facts in its jurisdictional brief alleging that at the time of removal the amount in controversy was well above the jurisdictional minimum of $50,000. *See* Appellee's Brief at 4-5. Kmart failed, however, to include any of these facts in its notice of removal.

Kmart's argument that the jurisdictional minimum is established by the removal notice's reference to the removal statute, 28 U.S.C. § 1441, is without merit. The removal statute does not refer to the requisite $50,000 amount in controversy, thus no jurisdictional amounts are incorporated into the removal notice by reference to the statute. Moreover, Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Kmart relies on *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993). *Shaw*, however, is inapposite because in *Shaw* the defendant's removal petition stated a good faith belief that the amount in controversy was greater than $50,000. When the court questioned the parties about this amount, the plaintiff took up the jurisdictional issue "with a vengeance," steadfastly maintaining that his complaint was worth less than $50,000. *See Shaw*, 994 F.2d at 366. By holding that jurisdiction existed, the Seventh Circuit prevented the plaintiff from manipulating the process in order to void an otherwise perfected removal. *See id.* at 368.

Appendix B

The *Shaw* court held that the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded $50,000. *Id.* at 367-68. We do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that "subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial *power* to decide a controversy." *Id.* at 371 (Shadur, J., dissenting). In this case, such power is clearly lacking.

We remand to the district court with instructions to vacate its judgment and remand the action to state district court.

REMANDED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-5107

LARRY LAUGHLIN,

Plaintiff - Appellant,

v.

KMART CORPORATION,

Defendant - Appellee.

ORDER
Filed: *December 14, 1994*

Two questions have arisen as to whether this Court has jurisdiction to hear this appeal.

First, we believe it is unclear whether there was an adequate allegation of jurisdictional amount in controversy to support removal of this case to the federal district court based on original diversity jurisdiction. We are mindful of Appellant's allegation of an amount in controversy in excess of $50,000 in his Appeal Brief at vii; however, we do not necessarily believe that this answers the question of whether there was a sufficient allegation of such an amount at the time of removal.

Second, we believe it is unclear whether Plaintiff-Appellant's notice of appeal was timely filed with respect to the

district court's Order entered on March 11, 1994, granting partial summary judgment to the Defendants. Plaintiff appealed this Order of the district court, and also appealed the district court's Order entered on April 21, 1994 denying his motion for reconsideration. We are only concerned here with the timeliness of the notice of appeal of the summary judgment Order entered March 11, 1994.

Prior to filing his notice of appeal, Plaintiff filed the above mentioned motion for reconsideration. In order to be considered under F.R.C.P. 59(e), and thus toll the period for an appeal pursuant to F.R.A.P. 4(a)(4), this motion had to be filed within 10 days of the judgment to be reconsidered, or by March 25, 1994. However, Plaintiff-Appellant filed the motion on April 1, 1994, thus effectively transforming it into a F.R.C.P. 60(b) motion. Because this was a Rule 60(b) motion, it did not toll the running of the 30 day period for notice of appeal under F.R.A.P. 4(a).

If the judgment appealed from had been a complete and final judgment, we believe the appeal would clearly be untimely and we would be without jurisdiction. However, the fact that Plaintiff is appealing a partial judgment may affect the analysis. We held in *Lewis v. B. F. Goodrich Co.*, 850 F.2d 641 (10th Cir. 1988) that a notice of appeal was not defective in appealing a partial judgment simply because it preceded a F.R.C.P. 54(b) certification or a complete and final judgment. However, *Lewis* does not answer the question of whether such a notice of appeal must be filed within 30 days of the partial summary judgment being appealed in order for *Lewis* to apply.

Accordingly, the parties are ordered to file simultaneous briefs in this Court by December 30, 1994 on each of the following jurisdictional issues: (1) whether there was an

Appendix C

adequate showing of jurisdictional amount in controversy at the time of removal to support original federal diversity jurisdiction in this case; and (2) whether Plaintiff-Appellant's notice of appeal was timely with respect to the Order of the district court entered on March 11, 1994. The briefs shall not exceed 10 pages in length.

Entered for the Court

s/ Patrick Fisher
PATRICK FISHER, Clerk

APPENDIX D — AFFIDAVIT OF CHRISTOPHER K. BEACHAM DATED DECEMBER 29, 1994

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 94-5107

LARRY LAUGHLIN,

Plaintiff-Appellant,

v

KMART CORPORATION,

Defendant-Appellee.

AFFIDAVIT OF CHRISTOPHER K. BEACHAM

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Christopher K. Beacham, being of lawful age and duly sworn, deposes and states as follows:

1. I am presently employed by Kmart Corporation ("Kmart") as a Buyer in its Automotive Service Division. From October, 1990 to August, 1993, I was employed by Kmart as Director of Field Operations, Auto Service. As such I had knowledge of the compensation scheme for National Accounts Managers, including Larry Laughlin.

2. In late January and early February, 1993, I was involved in coordinating with attorneys for Kmart on the removal of

Appendix D

Laughlin's case from Tulsa County District Court, State of Oklahoma, to the United States District Court for the Northern District of Oklahoma. Additionally, I was involved in the preparation of Kmart's Answer and Affirmative Defenses and Kmart's answers to Laughlin's first set of discovery requests which were served with his Petition.

3. In late January, 1993, and early February, 1993, as I reviewed the allegations of Laughlin's Petition, I was aware of the following:

- that Laughlin had resigned his employment on October 2, 1992;

- that Laughlin, at the time of his resignation, had an annual salary of $48,000 and that his target bonus opportunity for that year was $21,000;

- that Laughlin was claiming that Kmart breached its contract with him, and that by doing so, Kmart deprived him of a raise and his bonus for 1992;

- that Laughlin was claiming he had been wrongfully terminated from employment;

- that Laughlin was in his mid-50's and, assuming he had remained employed with Kmart, I estimated that he had from 7 to 10 years before he retired; and

- that Laughlin was claiming Kmart owed him back pay, front pay, the value of his lost benefits, lost raises and bonuses, interest and punitive damages.

Appendix D

4. As I assessed Laughlin's claim against Kmart, I estimated that if Laughlin prevailed, the potential liability to Kmart for back pay alone would be at least one year's salary and bonus ($69,000) and that a rudimentary analysis of his claim for front pay, assuming Laughlin intended to work another 7 years with Kmart, and that his compensation package remained constant, showed Laughlin's claimed damages to be approximately $483,000.

FURTHER, AFFIANT SAYETH NAUGHT.

s/ Christopher K. Beacham
Christopher K. Beacham

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Subscribed and sworn to before me, the undersigned Notary Public, this 29th day of December 1994.

s/ Laura L. Owens
Notary Public

[Stamped]
LAURA L. OWENS
Notary Public, Macomb County, Mich.
Acting in Oakland County, Mich.
My Commission Expires Aug. 29, 1998

My Commission Expires:

APPENDIX E — NOTICE OF REMOVAL OF CIVIL ACTION TO THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OKLAHOMA (INCLUDING EXHIBIT A) FILED FEBRUARY 2, 1993

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

Federal Court No. 93-C-0097 B
Tulsa County No. CJ 93 0143

LARRY LAUGHLIN,

Plaintiff,

vs.

KMART CORPORATION,

Defendant.

NOTICE OF REMOVAL OF CIVIL ACTION

Kmart Corporation, a Michigan corporation with its principal place of business in Michigan, hereinafter referred to as Defendant, respectfully petitions the Court, pursuant to 28 U.S.C. Section 1441, *et seq.*, for removal of the above-entitled action from the District Court in and for Tulsa County, State of Oklahoma, to the United States District Court for the Northern District of Oklahoma, and in support of its Notice of Removal, respectfully shows:

1. On or about January 12, 1993, Larry Laughlin commenced Case No. CJ-93-0143 in the District Court in and for Tulsa County, State of Oklahoma, which named Kmart Corporation, a Michigan corporation, as Defendant. The Petition

asserted an action for breach of contract and wrongful termination of employment. A true and correct copy of Plaintiff's Petition is attached hereto as Exhibit "A."

2. At the time this action was commenced and at all times relevant to the subject matter of this lawsuit, Plaintiff was and is a citizen of the State of Oklahoma, County of Tulsa.

3. At the time this action was commenced and at all times relevant to the subject matter of this lawsuit, Defendant was and is a Michigan corporation with its principal place of business in Michigan. Pursuant to 28 U.S.C. § 1441(b), Case No. CJ 93 0143 is removable to this court.

4. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1446(b).

5. This Notice of Removal is signed pursuant to Rule 11 of the Federal Rules of Civil Procedure.

6. Defendant shall promptly after filing this Notice, give notice of such filing to Plaintiff, as required by 28 U.S.C. § 1446(d), and will give written notice of such filing and will file a copy of the Notice with the clerk of the District Court in and for Tulsa County, State of Oklahoma, also as required by 28 U.S.C. 1446(d).

7. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings or orders served upon Defendant in this action are attached hereto as Exhibit "B," other than the Petition which is attached as Exhibit "A".

Appendix E

WHEREFORE, Defendant prays that further proceedings in the District Court in and for Tulsa County, State of Oklahoma, be discontinued and that the above-entitled action be removed to the United States District Court for the Northern District of Oklahoma, and for such other and further relief as this Court deems just, equitable, and proper.

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: s/ Kathy R. Neal
Lynn P. Mattson
OBA NO. 5795
Kathy R. Neal
OBA NO. 674
Kristen L. Gordon
OBA NO. 14239
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant,
Kmart Corporation

Appendix E

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 2nd day of February, 1993, a true and correct copy of the above and foregoing Notice of Removal of Civil Action was mailed, with proper postage thereon, to:

Gary Brasel, Esq.
Frasier & Frasier
1700 Southwest Blvd., Suite 100
P. O. Box 799
Tulsa, Oklahoma 74101

s/ Kathy R. Neal
Kathy R. Neal

Appendix E

EXHIBIT A

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ 93 0143

LARRY LAUGHLIN,

Plaintiff,

vs.

K-MART CORPORATION, INC., a Michigan corporation,

Defendant.

PETITION

COMES NOW Plaintiff, Larry Laughlin, and for his claim and cause of action against Defendant, K-Mart Corporation, Inc., alleges and states as follows:

JURISDICTIONAL FACTS

Plaintiff is a resident of Tulsa County, Oklahoma, and Defendant is a Michigan corporation, doing business in Tulsa County, Oklahoma, and this Court has jurisdiction over the parties and the subject matter.

Appendix E

FIRST CAUSE OF ACTION—BREACH OF CONTRACT

I.

On or about the 17th day of June, 1968, Plaintiff, Larry Laughlin, began working for Uniroyal who through a lease agreement did the auto work for Defendant, K-Mart.

II.

On or about the 3rd day of June, 1974, Defendant took over the automotive business from Uniroyal and Plaintiff at that time became an employee of K-Mart.

III.

On or about the 15th day of April, 1977, Plaintiff was promoted to District Manager and remained so until February, 1985, at which time he was promoted to National Account Manager and remained at that position until his terrnination on or about October 12,1992.

IV.

As a part and parcel of the terms of Plaintiff's employment agreement with the Defendant, Plaintiff was to receive an evaluation annually to determine his salary for the forthcoming year.

V.

As a part and parcel of Plaintiff's employment agreement with the Defendant, Plaintiff was to receive an annual bonus based upon the pre-tax profit of Plaintiff's sales territory.

Appendix E

VI.

On or about March 26, 1992, Plaintiff met with his supervisor, Brett Musser, to discuss Plaintiff's evaluation for the preceding year (1991), and Plaintiff was told that he had received a poor evaluation because of his inability to participate in certain activities of the Defendant which he considered to be illegal and was denied a bonus based upon territory that he did not service.

VII.

That in spite of the complaints of Plaintiff, Defendant totally and wholly refused to right the wrong they had committed and denied his raise or the bonus to which he was entitled.

WHEREFORE, Plaintiff prays for judgment against the Defendant for an amount in excess of $10,000, costs of this action, including a reasonable attorney's fee, and for any and all further relief to which said Plaintiff may be entitled in the premises.

SECOND CAUSE OF ACTION—WRONGFUL TERMINATION

VIII.

Plaintiff realleges and incorporates paragraphs I through VII alleged herein.

IX.

In late November or early December, 1991, Plaintiff reported to his supervisor, Brett Musser, that Defendant was overcharging some of their fleet accounts and that Defendant should cease these illegal practices.

Appendix E

X.

Brett Musser told the Plaintiff that he would look into the matter of illegal pricing but that Plaintiff should not be concerned about same.

XI.

Plaintiff continued to get complaints from his fleet accounts concerning overcharging and Plaintiff continued to report this information to his superiors at Defendant, K-Mart.

XII.

Defendant was caught overcharging one of their fleet accounts and made restitution, but continued their overcharging practices against all others.

XIII.

In April, 1992, Plaintiff complained to Ken Murray, Regional Director of Human Resources for K-Mart, alleging that there were no specification sheets and no gauges to check parts. Defendant did nothing about these complaints.

XIV.

In August of 1992, Plaintiff contacted his supervisor, Brett Musser, and complained about changes in prices which he considered illegal pricing practices and Brett Musser said he was not going to do anything about it.

Appendix E

XV.

On or about August 26, 1992, Plaintiff met with his supervisor, Brett Musser, in St. Louis, Missouri, at Mr. Musser's request and Plaintiff once again outlined his complaints concerning Defendant's overcharging and selling unneeded parts.

XVI.

In early September, 1992, Plaintiff received a letter from his supervisor, Brett Musser, outlining things that Plaintiff should do to improve his performance and the letter further stated that Plaintiff was being monitored.

XVII.

Plaintiff was told by Defendant that he should not make complaints concerning the cheating of Defendant's customers and should be a team player and continue his job even though it consisted of price gouging and sale of unneeded parts.

XVIII.

Plaintiff being no longer able to tolerate these unbearable conditions of facing his customers and further being told by the Defendant that he must continue participating in these illegal activities or lose his job, Plaintiff thereupon terminated his employment with Defendant on October 12, 1992.

XIX.

The Defendant's acts are of such a reprehensible nature that

they constitute gross misconduct and therefore as a lesson to others punitive damages should be awarded Plaintiff.

WHEREFORE, Plaintiff prays for front pay, back pay, interest, loss of benefits, bonuses, raises, and punitive damages in excess of $10,000, the costs of this action, including a reasonable attorney's fee, and for any and all further relief to which said Plaintiff may be entitled in the premises.

Respectfully submitted,

FRASIER & FRASIER

BY: s/ Gary Brasel
Gary Brasel OBA #1080
1700 Southwest Blvd, Suite 100
P.O. Box 799
Tulsa, OK 74101
918/584-4724

ATTORNEY'S LIEN CLAIMED:

s/ Gary Brasel
Gary Brasel

JURY TRIAL DEMANDED:

s/ Gary Brasel
Gary Brasel

[Stamped]
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LABOR RELATIONS

APPENDIX F — RELEVANT STATUTES AND RULE INVOLVED

28 United States Code § 1332(a):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 United States Code § 1441(a):

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For

> purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 United States Code § 1446(a):

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 United States Code § 1653:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 11(b) of the Federal Rules of Civil Procedure:

> **Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

12 Oklahoma Statutes § 2008(A):

A. CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain:

1. A short and plain statement of the

claim showing that the pleader is entitled to relief; and

2. A demand for judgment for the relief to which he deems himself entitled. Every pleading demanding relief for damages in money in excess of Ten Thousand Dollars ($10,000) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars ($10,000), except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount of Ten Thousand Dollars ($10,000) or less shall specify the amount of such damages sought to be recovered.

Relief in the alternative or of several different types may be demanded.

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No. 95-40

In The

Supreme Court of the United States

October Term, 1995

KMART CORPORATION,

Petitioner,

vs.

LARRY LAUGHLIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the issues sought to be presented to the Supreme Court are moot by virtue of this action having been remanded by the District Court to state court and the continuance of proceedings in state court.

2. Whether the failure even to allege that the amount in controversy was in excess of the jurisdictional minimum meets the requirements to justify removal, especially where the Petition for Removal attached the Petition filed by Petitioner in state court did not state that the claim exceeded $50,000.

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No. 95-40

In The

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTES AND RULES INVOLVED

In addition to the statutes and rules set forth by Petitioner, the following statutes and rules, which are fully reprinted in Appendix A, are involved: 28 U.S.C. § 1447(c), (d); and Rule 8(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Since the Tenth Circuit has denied rehearing, the United States District Court for the Northern District of Oklahoma has remanded the case to the District Court of Tulsa County, Oklahoma, where it originated, pursuant to the Court of Appeals decision. The Tulsa County District Court has taken and pursued actions to process the case through the state court system.

REASONS FOR DENYING THE WRIT

I.

THE MATTER PRESENTED TO THE SUPREME COURT IS NOW MOOT AND DOES NOT FALL WITHIN AN EXCEPTION TO THE MOOTNESS DOCTRINE.

Since the Tenth Circuit has reversed the decision of the trial court and ordered the trial court to remand the case to the District Court of Tulsa County, the United States District Court for the Northern District of Oklahoma has fulfilled its duty; the case has been remanded to state court. Such action renders moot anything that the Supreme Court could now do.

28 U.S.C. § 1447(c) indicates that when a certified copy of the order of remand is mailed by the clerk to the clerk of the state court, the state court may thereupon proceed with such case. Such events have now occurred.

28 U.S.C. § 1447(d) provides that an order remanding a case to the state court from which it was removed "is not reviewable on appeal or otherwise." Since such an order has now been made remanding the case to state court and since the state court is proceeding with the case, such decision is not reviewable on appeal or otherwise. In other words, this Court cannot, no matter

how it decides the matter, get the case back into the federal system and any decision rendered by this Court would be ineffective to change the proceedings of the state court. As such, the matter before this Court is now moot.

Exercise of federal judicial power depends upon the existence of a case or controversy. Where, as here, any issue to be decided by this Court would have no effect, then judicial power may not be exercised. *Securities and Exchange Commission v. Medical Committee for Human Rights,* 404 U.S. 403, 92 S. Ct. 577, 30 L. Ed. 2d (1972).

There is an exception to this mootness doctrine as set forth in *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L. Ed. 310 (1911). That exception is where a matter is "capable of repetition, yet evading review." Such is not the case here. Although the question here presented could be repeated and evade review, that could happen only when the case is remanded for lack of jurisdiction. However, as noted by the Petitioner, other circuits have ruled contrary to the Tenth Circuit on similar questions and have ruled in ways that would permit review by this Court. Indeed, it is Respondent's understanding that there is presently pending before this Court a Petition for Certiorari filed by a petitioner claiming lack of federal removal jurisdiction in a case arising out of the Fifth Circuit, *DeAguilar v. Boeing Co.,* 11 F.3d 55 (5th Cir. 1994). Respondent submits that if this Court wishes to deal with the questions raised by Petitioner herein, that it can do so in other cases that do not have the jurisdictional impediments that this does, namely mootness.

II.

REMOVAL OF THE INSTANT CASE TO FEDERAL COURT WAS PROCEDURALLY DEFECTIVE.

When Respondent brought this action in state court, he sought damages in excess of $10,000. Thus, the Petition filed in state court did not, on its face, meet the amount in controversy requirements of 28 U.S.C. § 1332 which would allow removal pursuant to 28 U.S.C. § 1441. 28 U.S.C. § 1446(a) requires that a notice of removal contain a short and plain statement of the grounds for removal. This would include "a short and plain statement of the grounds upon which the court's jurisdiction depends". Federal Rule of Civil Procedure 8(a). The Notice of Removal filed herein does state the citizenship of the Petitioner and Respondent, but does not allege that the amount in controversy meets the statutory requirement. Respondent submits that this is a procedural defect militating against the grant of a writ of certiorari.

CONCLUSION

Because the underlying case has now been remanded to state court, any decision rendered by this Court would have no effect as the remand Order of the District Court is not reviewable. Additionally, procedural defects in this case militate against a grant of certiorari. Finally, the issues raised in this case, to the extent that there is a conflict among the circuits, can be addressed in other cases that do not have the postural defects present here. Accordingly, Respondent respectfully submits that this case is not appropriate for this Court's review.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES AND RULES INVOLVED

28 United States Codes § 1447(c), (d):

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within thirty (30) days after the filing of the notice of removal under § 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an Order remanding a case to the State court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise.

Rule 8 (a) of the Federal Rules of Civil Procedure:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, unless the Court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief and (3) a demand for judgment for the relief that pleader seeks. Relief in the alternative or of several different types may be demanded.